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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 652

UNITED STATES OF AMERICA FOR THE USE OF THEODORE A. TANOS,

Petitioner,

vs.

ST. PAUL MERCURY INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DEAN, ADAMS, GEORGE & WOOD

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes and Rules Involed	2
Statement	3
Argument	3
I. There is No Conflict of Decision	4
II. The Decision Below is Clearly Correct	5
Conclusion	6

CITATIONS

Cases: Page

Confederation of Canada Life Insurance Co. v. Vega Y. Arminan, 135 So.2d 867 (3rd D.C.A. Fla.), *cert.den.* 144 So.2d 805 (Fla. 1963) 5

Mid-Continent Casualty Company v. Everett, 340 F.2d 65 (10th Cir. 1965) 4

Ospina v. Vanelli, 34 F.R.D. 151 (D.C. Minn. 1964) 4

Rumsey v. George E. Failing Co., 333 F.2d 960 (10th Cir. 1964) 4

Statutes and Rules:

Rule 4(c), Federal Rules of Civil Procedure 2

Rule 19, Revised Rules of the Supreme Court 2

Fla. Stat. Annot. ch.624.0221-.0222 (1965) 5

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OPINIONS BELOW

The order of the District Court from which the original appeal was taken appears at pp.30-31 of the record filed herein. The opinion of the Court of Appeals for the Fifth Circuit and the dissenting opinion (App. B of Petition) are reported at 361 F.2d 838.

JURISDICTION

The Petition invokes the jurisdiction of this Court under 28 U.S.C., Sec.1254(1). Respondent contends that the Petition does not satisfy the jurisdictional requisites of 28 U.S.C., Sec.1254(1) as construed by this Court, nor the considerations governing review on certiorari delineated in Rule 19 of the Revised Rules of the Supreme Court of the United States. The opinion of the Fifth Circuit sought to be reviewed accords, and does not conflict, with opinions of other Courts of Appeal.

QUESTION PRESENTED

Respondent submits that the issue involved should be re-stated as follows:

WHETHER RULE 4(c), FED. R. CIV. PROC., DESIGNATING THE PERSON WHO SHALL MAKE SERVICE OF ALL PROCESS, GOVERNS THE PROSECUTION OF STATE REMEDIES AVAILABLE UNDER RULE 64 AND RULE 69 WHEN ACTUAL SERVICE, RATHER THAN SUBSTITUTED OR CONSTRUCTIVE SERVICE, IS REQUIRED.

STATUTES AND RULES INVOLVED

The statutes and court rules cited in the Petition at p.2 are involved, as is Rule 4 of the Federal Rules of Civil Procedure.

STATEMENT

The pertinent facts are undisputed and are as recited in the Petition. Respondent supplements petitioner's statement in the following respects:

1. The Order Granting Motion To Quash Service of the first Writ of Garnishment expressly provides that it is "without prejudice to the plaintiff to re-serve the Insurance Commissioner in compliance with the Federal Rules of Civil Procedure". (R.7-8).

2. Petitioner elected not to re-serve the first Writ of Garnishment as authorized by the Court, but instead took an abortive interlocutory appeal. (R.8-9). Thereafter, approximately one year from the date of the first Writ of Garnishment, petitioner caused to be issued a second Writ (R.13-14), which was served on respondent on October 26, 1964 by the United States Marshal (R.14).

3. At the time the first Writ was served, respondent, as surety, was subject to numerous claims, attorneys' liens and Writs of Garnishment from Petitioner and other creditors, which exceeded the bond it had given to supersede a certain judgment. These claims are detailed in the Order Directing Payment Of Funds Into Registry of Court. (R.23-26). Petitioner had notice of the application for entry of this Order, and actively opposed same.

ARGUMENT

The issue presented by this petition for certiorari involves the interplay of the general principal that State law *determines the availability* of local remedies for se-

curity purposes or enforcement of judgments (Rule 64 and Rule 69), and the qualification that the Federal Rules *govern the prosecution* of such actions. Respondent submits that the resolution of this issue by the Fifth Circuit (App. B of Petition) was clearly correct and clearly consistent with decisions in other cases in other Courts of Appeals.

I.

There Is No Conflict of Decision

Petitioner has not shown, nor even alleged, a conflict in decisions among courts of appeals. The conflict petitioner alleges is between the Fifth Circuit Court of Appeals and a district court of another circuit. That district court opinion, *Ospina v. Vanelli*, 34 F.R.D. 151 (D.C. Minn. 1964) would not otherwise be final in the absence of review by this Court. Petitioner cites no cases, and respondent's research has disclosed no case, wherein this Court has suggested that a conflict of this type would justify the granting of certiorari.

The Fifth Circuit decision sought to be reviewed herein is, in fact, wholly consistent with similar decisions emanating from the Tenth Circuit. *Mid-Continent Cas. Co. v. Everett*, 340 F.2d 65 (10th Cir. 1965); *Rumsey v. George E. Failing Co.*, 333 F.2d 960 (10th Cir. 1964). These opinions were expressly noted and relied upon by the Fifth Circuit. (App.B. of Petition at p.4).

II.

The Decision Below Is Clearly Correct

The decision below holds that under the circumstances of this case, Rule 4(c) of the Federal Rules of Civil Procedure governed the service of a writ of garnishment issuing out of a district court. Both Rule 64 and Rule 69 provide in express terms for the controlling applicability of the other Federal Rules. (See App. B of Petition at pp. 3-4.) One such federal rule is Rule 4(c), the material part of which states that "service of *all* process shall be made by a United States marshall, by his deputy, or by some person specially appointed by the court for that purpose" . . . The plain meaning of Rule 4(c) is confirmed by the only pertinent decision, *Mid-Continent Cas. Co. v. Everett*, 340 F.2d 65 (10th Cir. 1965), which involved both a writ of garnishment and a Rule 69 proceeding. The *Mid-Continent* decision states that the federal rules control the matter and method of service in garnishment proceedings had in federal court, but holds only that compliance with the federal rules is sufficient.

Service of the Writ of Garnishment that is the subject matter of the Petition herein was **not** substituted service or constructive service involving only posting, publishing or mailing. Florida Statutes provide an exclusive method of serving insurers. (F.S.A. 624.0221-.0222). Service of process pursuant to the state statute constitutes actual service, *i.e.* personal serice. *Confederation of Canada Life Insurance Co. v. Vega Y. Arminan*, 135 So.2d 867 (3rd D.C.A. Fla.), *cert. den.* 144 So.2d 805 (Fla. 1962). The cited Florida Statutes do not authorize substituted service, nor constructive service, nor any mode

of service other than personal delivery to the exepressly designated agent of the insurer.

In accordance with local practice, Petitioner prepared the first Writ of Garnishment (R.2-3) and is responsible for its contents. Petitioner determined that the Writ should be addressed alternatively to "the Marshal and/or the Sheriff", and petitioner determined by whom the service should be effected.

The issue presented by this Petition is the same whether Rule 64 or Rule 69 is taken as the starting point. The district court opinion in *Ospina v. Vanelli*, *supra*, cited by petitioner, involves a Rule 64 proceeding. The decision of the Fifth Circuit discusses the issue in the context of both Rule 64 and Rule 69, and expressly relies on two Rule 69 precedents (App.B. of Petition at p.4).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

DEAN, ADAMS, GEORGE & WOOD

Goble D. Dean

Goble D. Dean
Counsel for Respondent

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition was mailed to Helen Tanos Hope, Concord Building, Miami, Florida this 4th day of November, 1966.

Goble D. Dean

Goble D. Dean